except with the permission of the Controller. It would be a matter for the applicant to get the permission of the Controller before the Senior Assistant Registrar here can make any payment to it from the proceedings of sale."

We are of the opinion that the learned judge was right in ordering the sale of the land by public auction. In making the order the implication is that the learned judge was satisfied that the bank was not carrying on banking business in Malaysia. There is no ground for us to interfere with the order made. We would dismiss the appeal with costs. Deposit to respondent on account of taxed costs.

Appeal dismissed.

Solicitors: *Ng Ek Teong & Partners; Yeow & Chin.*

RE LAW PUONG UNG LEE CHUAN HONG SDN. BHD. v. LAW PUONG UNG

[F.C. (Suffian L.P., Lee Hun Hoe C.J. (Borneo) & Syed Othman F.J.) May 6 and July 3, 1980]

[Kuching — Federal Court Civil Appeal No. 241 of 1979]

Bankruptcy — Application to set aside bankruptcy notice — Amount claimed no longer owed by debtor.

The respondent in this case had entered into an agreement with Lee Choon Teck, the managing director of the appellant company, to construct 16 houses for Lee Choon Teck. In return the respondent was to get 10 houses. The materials for building the houses were supplied by the appellants who claimed the balance of the price amounting to $238,361.49. The appellant obtained summary judgment against the respondent for the sum of $238,361.49 and interest but it was agreed that there should be no execution on the judgment until the transfer of certain lands and houses to the respondent's purchasers. On transfer of the houses respondent became entitled to the purchase money of $168,300 which together with $97,500 for the three houses sold to Lee Choon Teck, the managing director of the appellant company amounted to $265,800. This sum was more than enough to settle the sum claimed but the appellants alleged that the respondent was indebted to them in the sum of $82,300 which was advanced to him. The appellants therefore claimed that a sum of $76,603.49 being the balance due on the final judgment was due to them and they served a bankruptcy notice on the respondent. The learned trial judge held that the appellants were not entitled to deduct the alleged debt of $82,300 from the purchase price collected by the appellants and he held therefore that the judgment debt had been fully discharged. The appellants appealed.

Held: there was no reason for interfering with the finding of the learned trial judge that there had no prior arrangement for the deduction of the $82,300 from the purchase price and therefore the bankruptcy notice was rightly set aside on the ground that the respondent was no longer owing the appellants the amount claimed.

Case referred to:-

(1) *Lee Ah Thaw & Anor.* v. *Lee Chun Tek* [1978] 1 M.L.J. 173.

HIGH COURT.

J.C. Fong for the debtor.

Ee Poh Teck for the creditor.

Cur. Adv. Vult.

Seah J.: By this Notice of Motion dated September 13, 1979 the debtor, Law Puong Ung applies for an order that the Bankruptcy Notice dated July 11, 1979 be set aside on the ground, *inter alia*, that the debtor is no longer owing the creditor, Lee Chuan Hong Sdn. Bhd., Kuching, Sarawak, the amount claimed in the said Bankruptcy Notice. The brief facts insofar as they are relevant to this application are these:

(a) In C.S. No. K.119/77 the creditor took out a Specially Indorsed Writ of Summons against the debtor claiming the sum of $238,361.49 interest and costs.

(b) On May 15, 1978 it was ordered that leave be granted to the creditor to enter final judgment against the debtor in the sum of $238,361.49 together with interest thereon at the rate of 5% per annum calculated from March 24, 1977 up to the date of judgment and further interest at 6% per annum from the date of judgment until final payment and $300 costs and it was further ordered that there shall be no execution on the said judgment until the transfers of ten parcels of land mentioned in clause 2 of the Agreement to the debtor's purchasers or nominees within thirty days from date hereof have been effected and $42 costs of the application.

(c) On May 26, 1979 it was this day adjudged that the creditor do recover from the debtor the sum of $238,361.49 with interest at 5% per annum from March 24, 1977 to date thereof and further interest at 6% per annum from date of judgment until final payment and $300 costs.

(d) Out of the ten parcels of land it was common ground that the creditor transferred seven lots to the debtor's nominees or purchasers and three lots were resold to the creditor. It was alleged that the creditor received from the debtor's nominees or purchasers a total sum of $168,300 and the value of the three lots resold to the creditor amounted to $97,500. The combined total of the purchase price from the sales of these ten parcels of land would amount to $265,800.

(e) It was alleged that the debtor was indebted to the creditor in the sum of $82,300 and if this debt was taken into account, the debtor would still be indebted to the creditor. When the Bankruptcy Notice was taken out by the creditor, it was alleged the sum of $76,603.49 claimed by the creditor as being the balance due on a final judgment obtained by the creditor against the debtor vide C.S. No. K.119/77. In paragraph 9 of the creditor's affidavit of October 3, 1979 it was alleged that balance of the judgment debt still due and owing by the debtor was $71,773.44 and not $76,603.49 as stated in the Bankruptcy Notice.

(f) On September 7, 1979 a copy of the Bankruptcy Notice was duly served on the debtor. On September 11, 1979 this Notice of Motion was taken by counsel for the debtor and the filing fees were paid on this date.

For the debtor it was submitted that the judgment debt was $238.361.49 plus interest and $342 costs whereas the total purchase price collected and credited from the ten parcels of land amounted to $168,300 and $97,500 making a grand total of $265,800. It was argued that this sum of $265,800 was sufficient to pay off the judgment debt of $238,361.49, interest and costs. It was further contended that at the time of the issue of the Bankruptcy Notice on July 11, 1979

the debtor was not indebted to the creditor in respect of the judgment debt. In reply, counsel for the creditor has stated that the total purchase price collected from the seven nominees or purchasers of the debtor was $165,800 and not $168,300 as alleged by the debtor. Add the sum of $97,500 from the value of the resale of the three lots back to the creditor the grand total was $263,300. However, it was alleged by counsel for the creditor that the debtor was still indebted to the creditor in the sum of $82,300 and if this debt was taken into account, it would follow that the debtor was still owing the creditor some seventy thousand of the judgment debt.

The question I have to consider is whether or not the creditor was entitled to deduct this alleged debt of $82,300 from the purchase price collected by the creditor in respect of the 10 lots of land, referred to in the Order dated May 15, 1978. On the affidavit evidence filed herein I am satisfied that the debtor did agree through his advocates, Reddi & Co., Kuching that the purchase price of $263,300 or thereabout was to be used to pay off the judgment debt of $238,361.49. However, I am unable to find any satisfactory evidence whereby the debtor had given express consent to the creditor to deduct this alleged debt of $82,300 from the said purchase price. In the light of this finding, I am constrained to hold that the creditor had no right to deduct the sum of $82,300 from the said purchase price.

In paragraph 6 of the affidavit of the creditor dated October 3, 1979 it was alleged that up to May 31, 1978 the total amount of the judgment debt plus interest and costs was $252,773.44. Since the creditor had collected a total sum of $265,800 or $263,300 by way of purchase price from the sale of the 10 lots of land, and in the absence of any evidence to the contrary, I would be prepared to rule that at the time when the Bankruptcy Notice dated July 11, 1979 was issued, the judgment debt vide Civil Suit No. K.119/77 must be deemed to have been fully discharged and satisfied by the debtor.

For the above reason I set aside the said Bankruptcy Notice. I award to the debtor the costs of this motion to be taxed in the higher scale.

From the above judgment the creditor appealed to the Federal Court.

FEDERAL COURT.

Ee Poh Teck for the appellant.

J.C. Fong for the respondent.

Cur. Adv. Vult.

Lee Hun Hoe C.J. (Borneo) (delivering the judgment of the Court): This is an appeal against the decision of the learned judge in setting aside a bankruptcy notice on the ground that the debtor was no longer owing the creditor the amount claimed.

On June 30, 1972 Lee Choon Teck entered into a written agreement with respondent whereby the latter agreed to construct 16 houses for the former. In return respondent was to get 10 houses. The materials for building the houses were supplied by appellant who claimed for the balance of the price amounting to $238,361.49. When the 16 houses were completed the 10 houses which were to be transferred to respondent or his nominees were caveated by third parties. These caveats were removed by an order of this court in *Lee Ah Thaw & Anor.* v. *Lee Chun Tek.*[1] Three of the ten houses were resold to Lee Choon Teck at an agreed price of $97,500. Appellant's application for summary judgment was resisted by respondent for reasons set out in his affidavit. Lee Choon Teck in his capacity as appellant's managing director and principal shareholder had allowed respondent to defer payment of the price of goods until Lee Choon Teck in his personal capacity was able to transfer the 10 houses to respondent to enable respondent to collect the purchase money and pay off the price of the goods. On transfer of the 7 houses respondent would be entitled to the purchase money of $168,300 which together with $97,500 for the 3 houses sold to Lee Choon Teck would amount to $265,800. This sum would be more than enough to settle the sum claimed.

So, at the hearing counsel for respondent expressed no objection to the application for summary judgment on condition that execution be stayed until the 10 houses be transferred to respondent's purchasers or nominees. Counsel for appellant would seem to agree to the arrangement. The stay was necessary for respondent to collect the money for the 10 houses to pay off the judgment sum. Hence, the order dated May 15, 1978, *inter alia*, stated "that there shall be no execution on the judgment until the transfer of the ten (10) parcels of land mentioned in clause 2 of the agreement annexed to the defendant's affidavit affirmed on 11th day of May, 1978 to the defendant's purchasers or nominees within thirty (30) days from the date hereof have been effected...." This order, approved by counsel for appellant before sealing, was never amended varied or rescinded. Why did appellant not oppose stay of execution as the ten (10) parcels of land had nothing to do with appellant company but affected only Lee Teck Choon in his personal capacity? The simple answer has already been given earlier on. That is Lee Choon Teck in his capacity as managing director had agreed to respondent's term to allow Lee Choon Teck in his personal capacity to transfer the ten (10) parcels of land to respondent's purchasers or nominees. Unless respondent could transfer the ten houses he would not be able to receive the purchase money and to pay off the appellant's judgment debt. Appellant knew this.

It is difficult to understand the line taken by appellant that $97,500 is only a set off if respondent agrees to take the $82,300 advance into consideration. Lee Choon Teck in his capacity as managing director could agree to accept payment of $97,500 or any sum from himself in his personal capacity to satisfy the appellant's debt. He should not be allowed to blow hot and cold by distinguishing his two personalities to suit any situation. In the light of his attitude it is not surprising that the learned judge was not impressed by him.

Appellant mentioned verbal arrangement to take the $82,300 into account if the $97,500 was to be set off. It is for appellant to satisfy the court of such arrangement. The learned judge was quite right in view of the stand taken by appellant to say that the only question he had to consider was whether or not

appellant was entitled to deduct the $82,300 from the purchase price collected by respondent in respect of the ten (10) lots of land referred to in the order dated May 15, 1978. In his judgment the learned judge stated:—

"On the affidavit evidence filed herein I am satisfied that the debtor did agree through his advocates, Reddi & Co., Kuching, that the purchase price of $263,300 or thereabout was to be used to pay off the judgment debt of $238,361.49. However I am unable to find any satisfactory evidence whereby the debtor had given express consent to the creditor to deduct this alleged debt of $82,300 from the said purchase price."

The learned judge was perfectly right to hold that appellant had no right to deduct this sum from the purchase price. Further, it was clear from respondent's affidavit that he was disputing the right of appellant to claim this sum on the ground of limitation. In respect of the $97,500 Lee Teck Choon admitted owing this sum for buying the 3 houses from respondent. He never disputed owing this sum of money to respondent. Because appellant could not deduct the $82,300 from the purchase price appellant is now saying that the $97,500 cannot be set off. Appellant tried to impress upon us that Lee Choon Teck was not the appellant. But, it was never explained to us how was it possible for appellant to accept set off of $97,500 if respondent agreed to deduct $82,300 from the purchase money. The only acceptable explanation is Lee Choon Teck's part in the whole affair. He ran the appellant company as if it were his own concern. If appellant and respondent were concerned only there would be no problem. Lee Choon Teck in his capacity as managing director is now renegating the position he previously accepted. If in his capacity as managing director he agreed to accept $97,500 from himself in his personal capacity in settlement of appellant's debt what is there to stop the set off? The answer is the $82,300. If respondent would agree to allow deduction of $82,300 then appellant would agree to the set off of $97,500. Actually, appellant had nothing to do with either of these two sums except for Lee Choon Teck, who, on the one hand, asked respondent to build houses for him in his personal capacity and on the other hand permitted respondent to get materials from appellant to build those houses in his capacity as managing director of appellant company. So very much depended on which cap he was putting on at the time. If I may use a crude expression he chose his cap to suit the occasion most favourable to him.

There is no challenge to the learned judge's following finding that:—

"Since the creditor had collected a total sum of $265,800 or $263,300 by way of purchase price from the sale of 10 lots of land, and in the absence of any evidence to the contrary, I would be prepared to rule that at the time when the Bankruptcy Notice dated July 11, 1979 was issued, the judgment debt vide Civil Suit No. K. 119/77 must be deemed to have been fully discharged and satisfied."

Unless there was a prior arrangement between the parties appellant could not deduct the $82,300 from the purchase price. The learned judge had found no evidence of such arrangement. We see no reason for interfering with his finding. Accordingly, we would dismiss the appeal with costs. Deposit to respondent against taxed costs.

Appeal dismissed.

Solicitors: *Ee & Lim; Reddi & Co.*

SYARIKAT JENGKA SDN. BHD. v. ABDUL RASHID BIN HARUN

[F.C. (Raja Azlan Shah C.J. (Malaya), Syed Othman & Salleh Abas F.JJ.) June 8 & September 19, 1980]

[Kota Bharu — Federal Court Civil Appeal No. 133 of 1979]

Tort — Conversion — Failure to prove existence of object of tort of conversion.

Practice and Procedure — Preparation of appeal records — Unnecessary documents included — Costs.

Evidence — Admissibility of documents — Maker not called — Public documents — Documents not kept in ordinary course of business — Photostat copies — Evidence Act, ss. 32, 74, 78.

In this case the respondent, a timber logger, claimed that the appellant a logging company had removed and converted to its use 700 tons of timber belonging to the respondent. He sued the appellant for compensation for the loss of the timber. The appellant denied the allegation and made a counterclaim for the amount of royalty and fees alleged to be paid by him. The learned judge of the High Court gave judgment in favour of the respondent and dismissed the counterclaim for royalty. The appellant appealed.

Held: (1) on the evidence it had not been proved that the respondent did have 700 tons of timber logs kept at the log yards prior to the stoppage of work as alleged by him. The document relied upon by the respondent purported to be a record of timber extracted from the scheme and was written by his son who had since died. This document was inadmissible as there was no evidence to show that it was kept in the ordinary course of business or that it was an entry in a book of records regularly kept in the course of business. Moreover the tonnage written therein far exceeded 700 tons, which the respondent claimed to have been stolen by the appellant;

(2) as the goods which are an important element of the tort of conversion were not proved to have existed, the appellant could not be said to have removed them and converted them to its use and judgment should have been given in favour of the appellant;

(3) the respondent's own evidence showed that the theft of his timber occurred before he was requested to stop work, as the reason for the request was to enable investigation to be carried into the suspected theft of rubber;

(4) no conclusion could justifiably be reached that the appellant removed the respondent's timber. The inherent contradictions and improbability of the testimony of the respondent and the documentary evidence, all go to dispute the respondent's case;

(5) in respect of the counterclaim for royalty payments the appellant relied on documents which were photostat copies and as no explanation was given as to why the originals could not be produced, they were inadmissible and the counterclaim was rightly dismissed.

Cases referred to:

(1) *Miller* v. *Babu Madho Das* (1895-6) 23 I.A. 106, 116.

(2) *Bhagat Ram* v. *Khetu Ram & Anor.* A.I.R. 1929 P.C. 110, 112.

(3) *Ooi Soon Eng* v. *Ng Kee Lin* [1980] 1 M.L.J. 26, 68, 29.

(4) *Chow Yee Wah* v. *Choo Ah Pat* [1978] 2 M.L.J. 41, 44.

FEDERAL COURT.

Mohamed Ismail for the appellant.

Joseph Au for the respondent.

Cur. Adv. Vult.

Salleh Abas F.J. (delivering the judgment of the Court): In this case the respondent, a timber logger claimed that the appellant, a logging company had removed and converted to its use 700 tons of timber belonging to the respondent. He sued the appellant